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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 755

SAMUEL R. FRAZIER, *Petitioner*,

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT OF CALIFORNIA

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OPINIONS BELOW

The opinion of the District Court of Appeal, Fourth Appellate District of California is not reported. It is reprinted in Appendix A, pp. 1a-24a, *infra.* The order of the Supreme Court of California

denying a hearing, two justices dissenting, is reported at 62 A.C. No. 34, Minutes, pp. 3-4. It is reprinted in Appendix B, p. 24a, *infra*.

JURISDICTION

The District Court of Appeal entered its judgment on April 26, 1965. On June 23, 1965 the Supreme Court of California denied a timely application for hearing. On September 4, 1965 Mr. Justice Douglas signed an order extending the time for the filing of this petition for certiorari to November 19, 1965. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Is a defendant denied due process of law under the Fourteenth Amendment when he is convicted in a state court after being compelled by court order prior to trial: 1) to disclose the evidence he plans to present with respect to alibi; 2) to identify his potential character and expert witnesses; and 3) to turn over statements which his attorney has received from prosecution witnesses, and which the prosecutor thereupon shows to these witnesses in preparation of their testimony?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. They are reprinted in Appendix C, *infra*.

STATEMENT OF THE CASE[1]

A. The Evidence and Theories of the Parties

Petitioner was indicted by a Grand Jury and charged with four counts of abortion and several counts of sexual misconduct, all allegedly committed on the persons of four of his patients, Patricia Ann Watson, Barbara Tendler, Diedre Lingenfelter, and Maurine O'Connell. Petitioner pleaded not guilty on all counts. After a trial by jury he was convicted on the counts charging abortion of Watson, Tendler and Lingenfelter.

The trial was lengthy, but for purposes of this Petition it will suffice to summarize the evidence presented by the parties on the abortion counts on which petitioner was convicted, and to pinpoint the factual controversies on those counts. The District Court of

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[1] The record on appeal in the court below consists of four separately paginated sets of volumes. The jury was impanelled on February 17, 1964 and the proceedings from that day through the end of the trial are transcribed in fifteen volumes entitled "Reporters Transcript". They will be cited herein as "Tr." There is a single unnumbered volume also entitled "Reporters Transcript" which reports pre-trial proceedings on January 31, February 13 and February 14. This volume will be cited as "Rep. Tr." There are also a "Clerk's Transcript" ("Cl. Tr.") and a "Clerk's Supplemental Transcript" ("Cl. Supp. Tr."). The former includes *inter alia*, the indictment, docket entries, motions, requested jury instructions with notations whether they were granted or denied, and the interview between Barbara Tendler and counsel for the defense. The Clerk's Supplemental Transcript reports the interview between petitioner's attorneys and prosecution witnesses Maurine O'Connell and Carol Sims. These statements were required to be turned over to the prosecution before trial and were made part of the record on appeal to determine the constitutionality of the disclosure order. See pp. 6-7, *infra*.

Appeal summarized the evidence "viewed in the light most favorable to the prosecution" as follows:

> "The three women, Watson, Lingenfelter and Tendler, each of whom respectively was named in one of the first three counts of the indictment all dealt initially with appellant in substantially the same manner. Each suspected that she was pregnant and was from three and one-half weeks to two months overdue in her menstrual period; each was examined by appellant who confirmed to each the fact of her pregnancy; each told appellant of her desire to obtain an abortion. Appellant said to each of the women that he had a method of destroying the fetus in the womb by giving a series of four or more injections combined with manipulation of the uterus; that the price of the first four shots and treatments, which must be on consecutive days, would be $12 each; that if additional injections and treatments were necessary, they would be two or three in number and at weekly intervals, for which the price would be $13 each (there was a variance as to the number and spacing of the follow-up treatments in the testimony of one witness); that payment must be in cash; that she should come for the treatments at night or after hours on Saturday, and unaccompanied; that if she started receiving the treatments she must continue the course because a child which might be born after the treatments commenced would be either dead or deformed. Each of the women visited appellant's office in the manner outlined, and each received at least four injections and treatments in which appellant manipulated the uterus with one hand internally through the vagina, while exerting pressure upon the abdomen with the other hand; that during the treatment the patient was under the influence of Trilene, an analgesic or anesthetic gas capable of inducing unconsciousness; that each treatment

lasted from one-half to three-quarters of an hour; that after four or more of the treatments each of the women miscarried; that each of the women was in good health at the time she sought the services of the appellant." (App. A, pp. 1a-2a.)

The District Court of Appeal also summarized the defendant's testimony which was the basis of his case:

"Appellant testified that he told each of the women that he would use means to produce a miscarriage; but that he did so only to obtain time to determine whether the women were pregnant and in order that the women might not procure abortions elsewhere, so that by the time the treatments had been completed the pregnancies would be so far advanced that abortion would be out of the question; that the treatments in fact were only ordinary pelvic examinations; that the injections were of Prostigmin, which is used as a test for pregnancy and is not an abortifacient; that the Trilene gas was ordinarily used by him for pelvic examinations; that the treatments and the injections were only used to assist in determining the question of pregnancy; that the treatments were not intended, and would not be effective to induce a miscarriage. (App. A, p. 3a.)

Under California law the precise factual issues on the abortion counts were whether petitioner believed that the women were pregnant and whether he believed that the treatments which he gave would cause a miscarriage.[2] Accordingly, the prosecution con-

[2] The California law of abortion requires the prosecution to prove that the defendant believed that the women were pregnant and that he believed that his actions could cause them to miscarry. (See the instructions given by the court, Cl. Tr. pp. 269, 277-278). The prosecution is *not* required to prove that the abortion has taken place (Cl. Tr. p. 276).

tended that the defendant's examinations must have revealed to him that the women were pregnant, whereas the defendant testified that he did not know whether the women were pregnant. In order to establish that petitioner believed that his treatment could cause a miscarriage the prosecution relied on his admitted statements to the patients that he would abort them and on expert testimony that manipulation of a woman's uterus with undue force can cause a miscarriage. The defendant on the other hand testified that neither the shots which he gave nor the manipulation could cause an abortion and that this was his belief when he examined and treated the patients. He also produced expert witnesses who corroborated his view that a miscarriage cannot be caused by these means. Closely intertwined with the resolution of these basic factual issues were controversies regarding the dates of examinations, specifically the dates of Watson's first and last examinations, and that of Tendler's last examination. As the litigation of those issues was directly affected by the discovery order, they are discussed below, pp. 15-16. Finally, in view of the sharp conflict between the testimony of the prosecuting witnesses and that of petitioner, anything which bore on the jury's assessment of their credibility could affect the result.

B. The Discovery Orders

Prior to trial petitioner's counsel interviewed Barbara Tendler, Maurine O'Connell and Carol Sims, all witnesses who had been subpoenaed by the prosecution. Those interviews were transcribed by a court reporter. The prosecution moved to require the defense to produce those reports. This motion was first

argued before Judge Gardner on January 31, 1964, who granted it over defense objection. (Rep. Tr. p. 10). With the prosecution's consent (Id. p. 13) the motion was reargued on February 13. Defense counsel expressly relied on the Fifth and Fourteenth Amendments to the Constitution, emphasizing the privilege against self-incrimination. (Id. p. 25). The defense also objected that granting the prosecution's motion would violate the attorney work-product rule and would drastically interfere with the defense's right to cross-examine those witnesses by destroying the impeachment value of the statements. However, Judge Gardner adhered to his ruling (Id. pp. 45-46). The next day the defendant did turn over those statements and Judge Gardner stated, with the agreement of the prosecutor, that the defense had done everything possible to preserve its constitutional objections to the discovery order. (Id. pp. 54-55).[3]

During the trial it was revealed that the prosecutor had shown the witnesses the reports of their interviews with defense counsel. (Tr. pp. 768-769).

The prosecution also moved for an order requiring the defense to disclose the names and addresses of character witnesses to be called by the defendant; the names and addresses of witnesses to be called by the defendant to testify concerning the chastity of the named witnesses allegedly raped by the defendant; and the names of witnesses to be called by the defendant to testify as medical experts. (Cl. Tr. p. 197). Judge Gardner granted the motion over defense objection (Rep. Tr. 19-24), deeming the question con-

[3] The recorded portion of the Tendler interview is reproduced at Cl. Tr. pp. 207-211. The Sims interview is at Cl. Supp. Tr. pp. 2-14 and the O'Connell interview is at Cl. Supp. Tr. pp. 15-57.

trolled by *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879. (Rep. Tr. p. 36). The names of the witnesses were given the prosecution (Rep. Tr. pp. 48, 51-54; Tr. p. 663).

The discovery orders contemplated that the prosecution would interview the witnesses whose identity it learned and the record shows that such interviews did occur. (Tr. pp. 497, 663).

The prosecution also made an oral motion, which was granted (see Rep. Tr. pp. 10, 49), to require the defense to disclose whether it would rely on an alibi and the witnesses it would call on that issue. The record shows that in response to this order the defense produced records which the defense obtained from Doctor Frazier's answering service bearing on the alibi and the names of witnesses (id. pp. 495-497.)

The defense also obtained discovery against the prosecution although its extent is not shown by the record. In granting the prosecution's motion for production of the Tendler, Sims and O'Connell statements, Judge Gardner expressly disclaimed any reliance on the fact that the defense had obtained a court order allowing the defense to interview them. (Rep. Tr. pp. 18-19).[4]

C. Verdict, Sentence and Appeal

The trial was held before Judge Howard C. Cameron. The jury was selected and the prosecutor made his opening statement on February 17, 1964, and the trial proper began the next day. The jury began its deliberations at 9:17 A.M. on March 6 and returned its

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[4] Actually, this order was entirely unnecessary, because the defense was legally entitled to question prospective prosecution witnesses. *People* v. *Walker,* 155 Cal. App. 2d 134, 317 P. 2d 130.

verdicts at 6:35 P.M., March 7. (Cl. Tr. pp. 234-235). The jury found defendant guilty on the counts charging abortion of Watson, Tendler and Lingenfelter, and on one count of raping Tendler. The jury acquitted petitioner on ten counts and was unable to agree on three others (Cl. Tr. pp. 235-240)[5]. The court granted the defendant a new trial on the Tendler rape count. This count was thereupon dismissed on motion of the prosecution, as were the counts on which the jury had been unable to agree (Cl. Tr. p. 315).

On May 15, 1964 Judge Cameron sentenced petitioner to state prison for five years, with the sentence suspended under the usual terms and conditions of probation. As a further condition of probation petitioner was ordered to spend one year in County jail for each of the three counts on which he was convicted, said terms to run concurrently. (Cl. Tr. p. 316).

On appeal, the District Court of Appeals affirmed the sentence. The Court sustained the discovery orders, relying on *Jones* v. *Superior Court, supra,* and *People* v. *Lopez,* 60 Cal. 2d 223, 384 P. 2d 16, 32 Cal. Rptr. 424. (App. A, p. 12a, *infra*). The Court also rejected the claims that the orders to produce the Tendler, Sims and O'Connell interviews unlawfully required discovery of attorneys' work product and seriously interfered with the cross-examination of these witnesses. (Id. p. 11a, *infra*).

Petitioner filed a Petition for Hearing with the Supreme Court of California, preserving his federal constitutional contentions. On June 23, 1965 the Supreme Court entered an order, without opinion, denying a hearing. Justices Peters and Peek dissented.

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[5] One count had been dismissed by the prosecution before trial for lack of sufficient evidence. (R. Tr. pp. 12-13).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SUBSTANTIAL QUESTIONS UNDER THE FOURTEENTH AMENDMENT

A. The Discovery Orders Violated Petitioner's Privilege Against Self-Incrimination

The paramount question presented by the disclosure orders is whether compulsory pre-trial discovery against the defendant in a state criminal case violates the privilege against self-incrimination. The answer, that such discovery is forbidden, has been required since *Malloy* v. *Hogan,* 378 U.S. 1 held that "the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty * * * for such silence." 378 U.S. at 8. For it was recognized in *Malloy,* and reiterated in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55 and *Griffin* v. *California,* 380 U.S. 609, 614 "that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment is its essential mainstay. * * * Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy,* 378 U.S. at 7-8. In short, when our forefathers "wrote this provision into the Fifth Amendment of the Constitution [they] had in mind a lot of history which has been largely forgotten today. * * * They made a judgment and expressed it in fundamental law, that it were better for an occasional crime to go unpunished *than that the prosecutor should be free to build up a criminal case*

in whole or in part, with the assistance of forced disclosures by the accused." *Ullmann* v. *United States,* 350 U.S. 422, 427 quoting with approval from *Maffie* v. *United States,* 209 F. 2d 225, 227 (CA 1) (emphasis supplied).

In *Malloy* v. *Hogan,* 378 U.S. 1 at 8-9, this Court followed "the great case of *Boyd* v. *United States,* 116 U.S. 616, decided in 1886, which, considering the Fourth and Fifth Amendments as running 'almost into each other' id., at 630, held that * * * any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime * * * is within the condemnation of" the Fourth and Fifth Amendments. *Boyd* held unconstitutional a statute which required the defendant in a forfeiture proceeding, on motion of the government, alleging what it expects to prove thereby, to produce records in his possession; the government's allegations being taken as confessed if production were refused. While only records were directly involved in *Boyd,* the clear implication of the Court's language (including that quoted in *Malloy*) is that any other form of compulsory disclosure would likewise be forbidden.[6] Doubtless for that reason it was long regarded as axiomatic by the courts, including some great judges, that discovery against the defendant in a criminal case is

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[6] In this case, of course, the discovery order did encompass records, namely the materials from petitioner's answering service and the Tendler, Sims and O'Connell statements. See pp. 7-8, *supra.* While our reliance on the due process clause of the Fourteenth Amendment encompasses the rights defined in the Fourth (*Ker* v. *California,* 374 U.S. 23) separate discussion of the Fourth Amendment in this Petition is obviated because of its intimate relation to the Fifth.

barred by the privilege against self-incrimination.[7] Nevertheless, in *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879, the Supreme Court of California allowed discovery against the defendant in a criminal case.[8]

Justice Traynor, who wrote for the majority in *Jones,* rejected the contention that the discovery which he allowed violated the privilege against self-incrimination. Justice Peters dissented on this ground and Justice Dooling dissented on another ground, though expressing doubts regarding the constitutionality of the result reached by the majority.

The decisions of this Court which have already been cited are, we submit, squarely contrary to the *Jones* holding; even if we should be wrong, those decisions

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[7] E.g., *United States* v. *Garsson,* 291 Fed. 646, 649 (S.D.N.Y., L. Hand, J.); *State* v. *Tune,* 13 N.J. 203, 211-12, 98 A.2d 881, 885 (Vanderbilt, C.J.); *State* v. *Rhoads,* 81 Ohio St. 397, 424, 91 N.E. 186, 192; *McClane* v. *Commonwealth,* 202 Va. 197, 204-205, 116 S.E.2d 274, 280; *Temple* v. *State,* 15 Okla. Crim. 146, 175 Pac. 155.

[8] In *Jones,* a rape prosecution, the defendant had indicated that he would put on evidence to show that he was impotent. The California Supreme Court required petitioner to reveal the names and addresses of witnesses he intended to call and to produce reports and x-rays he intended to introduce in evidence to support his defense of impotence. It also disapproved certain broader disclosure requirements which had been imposed by the trial court. The issue returned in *People* v. *Lopez,* 60 Cal.2d 223, 384 P.2d 16, 32 Cal. Rptr. 424, *cert. denied,* 375 U.S. 994. There, the trial court had ordered the defendants to produce the names and addresses of alibi witnesses they anticipated calling; written statements or notes of statements by such witnesses; recordings and notes of statements of witnesses who had testified at the preliminary hearing. Because there was no showing that disclosure actually had been made, the California Supreme Court did not decide whether the order was proper, but in dictum suggested that it was authorized by *Jones.*

surely allow no doubt of the substantiality of the constitutional question raised by this case, in which *Jones* was applied and extended. A petition for certiorari is not the appropriate occasion for full-blown analysis of constitutional issues and we would normally be content to end our discussion at this point. However, the *Jones* opinion was written by a distinguished judge who recognized the gravity of the constitutional question and met it squarely.[9] We think it appropriate therefore to examine Justice Traynor's reasoning in *Jones* in light of the facts of this case to determine whether his conclusion can be squared with this Court's teachings concerning the privilege against self-incrimination.

Justice Traynor placed heavy reliance on the laws of fourteen states[10] which require a defendant to give notice to the prosecution whether he will offer an alibi and in some instances require him also to identify the witnesses whom he will call on that issue: "Although such discovery may require a defendant to disclose evidence that would lead to effective rebuttal of his defense these statutes have been uniformly upheld against the claim that they violate the privilege against self-incrimination,"[11] citing cases from Ohio, New

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[9] See Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma,* 53 Cal. L. Rev. 89, 90-91.

[10] See Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 Cal. L. Rev. 56, 61, n. 13; Fletcher, *Pretrial Discovery in State Criminal Cases,* 12 Stan. L. Rev. 293, 315, n. 88; Comment, 15 Stan. L. Rev. 700, 701, n. 7.

[11] 58 Cal.2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

York and Wisconsin.[12] As authority, these cases are of limited value, since only the New York decisions even discuss the privilege against self-incrimination and only one trial court opinion seriously analyzes the issue.[13] But while the analogy does not materially advance the constitutional argument, the alibi statutes do reflect acceptance of the premises on which the *Jones* opinion rested: 1) The discovery order deals only with evidence in support of an affirmative defense and therefore does not require the defendant to help the prosecutor build up the case against him; and 2) The discovery order deals only with evidence which the defendant will necessarily introduce and therefore does not violate his right of silence. Both premises are indispensable to the constitutionality of the *Jones* result. But we submit that both are unsound:

1) The majority's reliance on the concept of "affirmative defense" was cogently criticized by Justice Peters in his dissenting opinion:

> "It is a logical impossibility for a trial court to determine in advance what information requested by the prosecution relates solely to an affirmative defense and what information will not aid the prosecution in the preparation of its case against defendant. This is so because innocence is the

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[12] *State* v. *Smetana*, 131 Ohio St. 329, 2 N.E.2d 778; *State* v. *Thayer*, 124 Ohio St. 1, 176 N.E. 656, 76 A.L.R. 48; *People* v. *Shulenberg*, 279 App. Div. 1115, 112 N.Y.S.2d 374; *People* v. *Rakiec*, 260 App. Div. 452, 23 N.Y.S.2d 607; *People* v. *Schade*, 161 Misc. 212, 292 N.Y.S. 612 (Sup. Ct.); *State* v. *Kopacka*, 261 Wis. 70, 51 N.W.2d 495.

[13] *People* v. *Schade*, 161 Misc. 212, 292 N.Y.S. 612 (Sup. Ct.).

very antithesis of guilt. Anything bearing upon one necessarily affects the other."[14]

Justice Peters' views are confirmed by examination of the alibi issue on which the government obtained discovery in this case. Pursuant to the discovery order petitioner advised the prosecution that he would present evidence that he had been working at a charitable function known as the "Lions' Fish Fry" the entire weekend of June 2, that he was at a baseball game on the night of June 12 and that he was on a fishing trip from noon June 15 to the afternoon of the 16th. This contradicted Watson's testimony that her first examination was on June 2, that she visited the doctor the nights of the 12th and the 15th, and that on the latter occasion he told her he had broken her bag of water. Petitioner's position was that the first examination was on May 26 and the last on June 6, and he denied ever having broken her bag of water or having said that he did. This evidence, though in the nature of an alibi, related directly to issues which the prosecution was required to prove as part of its case, see pp. 5-6, *supra*. Thus, the date of the first examination could determine the question whether petitioner believed Watson to have been pregnant after his first examination;[15] the dates of the last bore

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[14] 58 Cal.2d at 68, 372 P.2d at 925, 22 Cal. Rptr. at 885. See also Louisell, op. cit. n. 9, *supra* at 92, n. 18; Comment, 10 U.C.L.A. Rev. 937, 939, 940, n. 23.

[15] Because of the age of the fetus at the time of miscarriage any doctor who examined Watson on June 2 would have been more likely to know that she was pregnant than on May 26. Dr. Frazier testified that he could not ascertain whether Watson was pregnant because: a) She was so sensitive to the bi-manual examination that he could not accurately make it (Tr. p. 1181); and b) To the extent that he could make findings they were inconsistent with her being four months pregnant and Watson had told him that it had been four months since she had intercourse (Tr. p. 1165).

directly on the prosecution's claim that petitioner believed that he could cause a miscarriage.[16] Additionally, if the jury resolved this issue against Watson's version it would have been less likely to believe her testimony generally.

Even if facts could be neatly classified as "supporting an affirmative defense," and "building the prosecution's prima facie case",[17] such a feat could not save the orders in this case; the disclosures required of petitioner, (notably the statements of the prosecution's own witnesses) went beyond petitioner's "affirmative defenses" no matter how broadly that phrase is defined. Nor could the distinction, even if sound, provide a basis, as the majority in *Jones* intended, for even a narrow degree of discovery against criminal defendants. Mr. Justice Traynor acknowledged that

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[16] If petitioner examined Watson on June 15, two days before the fetus was expelled, the jury might well have decided that he indeed had broken her bag of water, as she testified he said. But if her last examination was on June 6, it would have been extremely unlikely that he had broken her bag of water. The importance of the issue and the effect of the disclosure order are indicated by the prosecution's shift of position during the trial. In its opening statement the prosecution said that its experts would estimate the time between the death of the fetus and its expulsion as one to four days (Tr. pp. 57-58). After the prosecution learned of petitioner's alibi for the 12th and 15th, however, their experts asserted that the period was two to ten days (Tr. pp. 380, 381, 397) although one of them reiterated on cross-examination that one to four days was the better estimate (Tr. p. 417), and the other told defense counsel on the day he testified that it could not have been more than a week (Tr. p. 385).

[17] "However, an accused criminal, even an innocent one, may realize that the same witnesses or documents that will aid him in establishing his defense may also hurt his case in other ways." Comment, 63 Col. L. Rev. 361, 366. See also Comment, 15 Stan. L. Rev. 700, 703.

a defendant, unlike a witness, "need make no showing that the answer or document sought may be incriminating * * * for the very fact that the prosecution seeks it, establishes that in the prosecution's view it may be incriminating."[18] This concession is irreconcilable with compulsory disclosure, narrowly limited though it may be.

2) The premise of the *Jones* opinion that the evidence discovered "will necessarily be revealed at the trial" and therefore does not infringe the defendant's constitutional right to silence, misconceives the basis of that right. To assume in advance of trial that the defendant will have to put on any kind of case is simply to reverse the presumption of innocence. But the presumption of innocence is protected not only by the Fifth Amendment's Due Process Clause[19] but also by its Self-Incrimination Clause. *Griffin* v. *California*, 380 U.S. 609, 613.[20]

Thus, the issue of when the defendant must reveal his case, which the *Jones* opinion treats as a mere

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[18] 58 Cal. 2d at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881, citing 8 Wigmore, *Evidence*, (McNaughton Rev. 1961) § 2260, p. 369.

[19] *Tot* v. *United States*, 319 U.S. 463. The presumption of innocence is of course guaranteed in state criminal trials by the due process clause of the Fourteenth Amendment, *McFarland* v. *American Sugar Rfg. Co.*, 241 U.S. 79, 86. We reserve the right to argue, if certiorari is granted, that petitioner's conviction was unconstitutional also because the discovery orders deprived him of the benefits of this presumption and required so pervasive a disclosure of his case as to make a fair trial impossible, even if discovery orders of lesser sweep are constitutionally permissible.

[20] See also, Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 J. Clev. B.A. 91, 98 (1954); Griswold, *The Fifth Amendment Today* 9 (Harv. Univ. Press, 1955); Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472, 488 (1957).

matter of trial strategy, is at the heart of the constitutional right of silence, which allows the defendant to put the government to its proof before he can be called upon to decide how he will defend. In this case the prosecution learned through the discovery orders that the defendant would testify and the defense's theory on the abortion counts.[21] Nor can it be said that the defendant's disclosure is voluntary when the price of silence is that he will be foreclosed from offering evidence (no matter how vital to his defense) if he chooses not to reveal it before the prosecution has put on its case.[22] A like argument was

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[21] Even more revealing to the prosecution than the information regarding petitioner's alibi, see pp. 15-16, *supra*, was the identification of his expert witnesses. In determining whether to put an expert witness on the stand a party discloses his version of the facts to the expert to determine whether his opinion would support that party's position. After they were identified, the prosecuting attorney spoke with petitioner's experts (as he was entitled to do) Tr. p. 663; he undoubtedly asked them about their planned testimony. Their answers would necessarily have disclosed the defense's theory, for example, that the petitioner would not deny that he had examined the patients. Moreover, since only the defendant doctor knew exactly what treatments he had given, and the factual predicate of the "hypothetical" questions which defense counsel would ask the experts on the stand could only be obtained through defendant's own testimony, the prosecution learned that defendant would testify and the substance of his testimony. This included above all, what treatments he would say he had given, and that he did not believe that these could cause a miscarriage, one of the central issues in the case, see p. 5, *supra*.

[22] In *People* v. *Modesto*, 62 A.C. 452, 398 P.2d 753 the Court (Peters, J. dissenting) sustained the California rule permitting comment on the defendant's silence on the ground that the defendant "remains free not to testify". This Court disagreed, because the rule "cuts down on the privilege by making its assertion costly." *Griffin* v. *California*, 380 U.S. 609, 614. But the prosecutor's comments to the jury are a small price compared to that exacted by the *Jones* case.

met and rejected in *Boyd* v. *United States,* 116 U.S. 616.[23]

Though we doubt that the discovery orders in this case achieved that objective,[24] we recognize that the *Jones* decision was designed to promote the search for truth in criminal trials. But this is not the exclusive or even the highest goal of our criminal law, as the privilege against self-incrimination demonstrates by its very existence. See also *Rogers* v. *Richmond,* 365 U.S. 534, 540-541; *Mapp* v. *Ohio,* 367 U.S. 643, 655-660. Because the privilege may operate to deny the prosecution information which would result in the conviction of an offender, it has been ridiculed by respected authority as embodying a sporting theory of criminal justice.[25] But it is precisely because the lives and liberties of men, rather than foxes, are at stake, that a civilized jurisprudence insists "upon conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impar-

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[23] "But in regard to the Fourth Amendment, it is contended that, * * * the order in the present case * * * * is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of." 116 U.S. at 621-622.

Cf. Cardozo, C.J. in *People ex rel. Lemon* v. *Supreme Court,* 245 N.Y. 24, 35, 156 N.E. 84, 87: "The course of the trial might be changed with the possible result that justice would miscarry, for a penalty of disobedience [to a disclosure order against the prosecution] was to be the exclusion of the evidence."

[24] The disclosure of the interviews of the prosecution witnesses, for example, could only obscure the truth by impeding their cross-examination. See pp. 21-23, *infra.*

[25] Bentham, *Rationale of Judicial Evidence,* B. IX, P. IV, C. III, in 7 Jeremy Bentham's Works 454 (Bowring's ed., 1843).

tiality."[26] "The Founders of the Nation were not naive or disregardful of the interests of justice."[27] But they deliberately required prosecuting officials "to search for independent evidence instead of relying upon proof extracted from individuals by force of law,"[28] for they determined the privilege against self-incrimination to be one of "the principles of a free government."[29] The disclosure orders against petitioner cannot be reconciled with that principle.

B. The Order to Produce the Prosecution Witnesses' Statements Also Violated Petitioner's Rights of Counsel and of Cross-Examination

1) *The Right to Counsel.* The statements of Tendler, Sims and O'Connell, which Petitioner was required to produce, were obtained by his attorneys in the course of their independent investigation of the case.[30] They were, in other words "work product of the lawyer", *Hickman* v. *Taylor,* 329 U.S. 495, 511. Accordingly, in addition to the issues under the due process clause of the Fourteenth Amendment raised by the discovery order as a whole, there is presented

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[26] *United States* v. *White,* 322 U.S. 694, 698.

[27] *Ullmann* v. *United States,* 350 U.S. 422, 427.

[28] *United States* v. *White,* 322 U.S. 694, 698.

[29] *Boyd* v. *United States,* 116 U.S. 616, 632; *Malloy* v. *Hogan,* 378 U.S. 1, 9.

[30] This clearly appears from the reports of the interviews themselves as well as from the prosecutor's description of the background of his motion to produce (Rep., Tr. pp. 4-5). The contrary, unsupported statement of the District Court of Appeal (App. A., p. 11a, *infra*) cannot foreclose this Court's consideration of the constitutional issue. See, e.g. *Avery* v. *Alabama,* 308 U.S. 444, 447.

the question whether the compulsory disclosure of his attorney's work product in a criminal case, violates a defendant's constitutional right of counsel.

In *Hickman* v. *Taylor,* this Court held that wholly comparable interview reports were not subject to discovery under the Federal Rules of Civil Procedure. The *Hickman* opinion did not, of course, depend on the Constitution, which has not been held to guarantee counsel in *civil* cases. But its reasoning, that discovery of counsel's work product obstructs the "[p]roper preparation of a client's case", 329 U.S. at 511, compels the same result in *criminal* cases where the effective assistance of counsel is guaranteed by the Constitution. *Powell* v. *Alabama,* 287 U.S. 45; *Gideon* v. *Wainwright,* 372 U.S. 335. For as was recognized in the *Powell* case itself, that guarantee encompasses counsel's *effective aid* in the *preparation* and trial of the case". 287 U.S. at 71, emphasis of Clark, J. in *The Sixth Amendment and the Law of the Land,* 8 St. Louis U. L.J. 1, 8. See also *Avery* v. *Alabama,* 308 U.S. 444, 446; *Jones* v. *Cunningham,* 297 F. 2d 851, 855 (CA 4); *Johnson* v. *United States,* 328 F. 2d 605, 606 (CA 5); *Tucker* v. *United States,* 235 F. 2d 238, 240 (CA 9). A state rule of procedure which deprives the defendant of the effective assistance of counsel at any stage violates the Fourteenth Amendment. *Ferguson* v. *Georgia,* 365 U.S. 570.

2) *The Right to Cross-examine Adverse Witnesses.* The order requiring production of the statements enabled the prosecutor to show them to the witnesses who had given them, destroying their value for impeachment purposes, and severely inhibiting the cross-

examination of these key witnesses.[21] Petitioner was thereby deprived also of his rights under the Confrontation Clause of the Sixth Amendment which is made applicable to the states by the Due Process clause of the Fourteenth. *Pointer* v. *Texas,* 380 U.S. 400; *Douglas* v. *Alabama,* 380 U.S. 415.

This Court in *Jencks* v. *United States,* 353 U.S. 657, and Congress implicitly in the Jencks Act, 18 U.S.C. § 3500 (see *Campbell* v. *United States,* 365 U.S. 85, 92) affirmed "the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." 353 U.S. at 667. In directing the prosecution to supply the defendant with pre-trial statements of prosecution witnesses the *Jencks* opinion was not obliged to rest on the Constitution, "but it would be idle to say that the commands of the Constitution were not close to the surface of the decision", *Palermo* v. *United States,* 360 U.S. 343, 362-363 (concurring opinion). Those commands are directly involved in the present case, where the interference with cross-examination was more drastic, and the countervailing interests which led to passage of the Jencks Act[22] are absent.

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[21] The record shows that the court understood that the prosecution's motion to produce was designed to enable it to show the statements to its witnesses, and the defense specifically objected that "If these statements are turned over to the District Attorney he will be able to use them to rehabilitate the witnesses before they ever take the witness stand, and the defense of this case will be shaken to its roots before the first witness is sworn." (Rep. Tr. p. 27)

[22] These are avoidance of unreliable informal or noncontemporaneous accounts of a witness' statement and protection of government secrets. See *Palermo* v. *United States, supra.*

In *Jencks* the trial court merely denied the defense the use of potential impeaching materials in the prosecution's possession; in this case the defense had itself obtained the statements for impeachment purposes and was required to give them to the prosecutor who used them to prepare his own witnesses. Thus the proponent of testimony was permitted to reinforce it by immunizing his witnesses against effective cross-examination.

Not only was the impeachment potential of the statements themselves neutralized, any restraint on the witnesses due to failure to recall what they had previously told the cross-examining party was removed. Moreover, this procedure invited each witness to tailor her testimony to fit her statement. Rather amazingly, the District Court of Appeal thought that this possibility *benefitted* the defendant: "the effect of the witnesses' having seen the statements would have been to caution them against testimony more unfavorable to appellant than that contained in the statements." App. A, p. 11a, *infra*. This reasoning entirely misses the point that the primary use of the statements was for impeaching the witnesses on cross-examination and impugning the credibility of their entire testimony. See *Jencks, supra*, 353 U.S. at 667. The order of production foreclosed the use of the statements for this purpose, and restricted petitioner's cross-examination of three of the prosecution's main witnesses so severely that his rights under the Confrontation Clause were undermined.

II. THE QUESTION IS IMPORTANT TO THE ADMINISTRATION OF CRIMINAL JUSTICE

When the Supreme Court of California first authorized compulsory discovery against defendants in criminal cases, *Malloy* v. *Hogan,* 378 U.S. 1 had not yet been decided. Now, however, every conviction obtained after the prosecution has utilized the procedures sanctioned by *Jones* v. *Superior Court* is subject to attack as violating the defendant's federal privilege of self-incrimination. The question presented by this case also directly affects the validity of the notice of alibi statutes of fourteen states, see p. 10, n. 12, *supra.* As long as it is unresolved, *Malloy* v. *Hogan* will place in jeopardy all convictions where notice of alibi has been compelled or where the defendant has been denied the right to introduce evidence because he failed to give notice. An issue with such broad import on state criminal law procedures plainly warrants the consideration of this Court, and an early resolution would be beneficial whatever the ultimate outcome.[33] If discovery against defendants is constitutional in whole or in part, prosecuting attorneys should know it so that they can utilize these procedures without fear of losing convictions on appeal. If, on the other hand, it is unconstitutional, it should be discontinued now and petitioner's conviction should not stand.

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[33] The issue has also confronted the Advisory Committee on the Federal Rules of Criminal Procedure. Their Preliminary Draft of Proposed Amendments (Dec. 1962) 31 F.R.D. 665 adopted a Rule 12A requiring notice of alibi defense. See 31 F.R.D. at 675-76. This proposal was dropped in the Second Preliminary Draft (March, 1964), 34 F.R.D. 411, but that Draft proposed adoption of a Rule 12.1, requiring notice of insanity defense. 34 F.R.D. at 418. While decision of constitutional issues unavoidably inheres in the promulgation of Rules by this Court, cf. *Singer* v. *United States,* 380 U.S. 24; *Sibbach* v. *Wilson,* 312 U.S. 1, it is surely preferable if possible, that they be anticipated in the normal course of the Court's adjudicatory functions.

Determination of the constitutional limits of discovery against defendants is important and timely also because of the close connection between this problem and discovery in favor of defendants—an issue of increasing concern to courts and commentators.[34] From the beginning, proposals to grant discovery to defendants have been opposed in part on the assumption that one-way discovery would give defendants an unfair advantage, while mutual disclosure is constitutionally forbidden.[35] If the orders entered against petitioner are sustained by this Court, the advisability of discovery in criminal cases can then be examined unclouded by constitutional doubts. If the Constitution allows the prosecution to compel disclosure of some matters, but not others, the wide range of disclosures required by the trial court makes this case an appropriate vehicle for drawing the line. Finally, if this Court holds that the Constitution protects defendants absolutely against compulsory disclosure, the occasion will be ripe for a definitive assessment of the view that discovery against the prosecution must likewise be foreclosed. One premise of those who take this view—that the defendant is

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[34] See, e.g. *State* v. *Johnson*, 28 N.J. 133, 145 A. 2d 313; *People* v. *Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881; *Di Joseph Petition*, 394 Pa. 19, 145 A. 2d 187; *State* v. *Thompson*, 54 Wash. 2d 100, 338 P. 2d 319; Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, [1963] Wash. U.L.Q. 279; Garber, *The Growth of Criminal Discovery*, 1 Crim. L. Q. 3; *Discovery in Federal Criminal Cases* (A Symposium of the Judicial Conference of the District of Columbia Circuit), 33 F.R.D. 47. See also the authorities cited in n. 10, *supra*.

[35] In addition to the opinions of Judges L. Hand and Vanderbilt cited at n. 7 *supra*, see the remarks of Thomas A. Flannery, Esq., in Symposium, n. 34 *supra*, 33 F.R.D. at 74.

excessively favored by our procedures—has already been widely disputed.[36]

The experience of New Jersey, which has liberalized discovery in favor of defendants[37] without following California to compel discovery against them, has not substantiated the fear that prosecutions would be seriously hampered. The current debate gives promise of significant procedural advances. But these await resolution of the constitutional question presented by this case.

CONCLUSION

This Petition for Certiorari should be granted.

Respectfully submitted,

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[36] The most thorough treatment is Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149. One relevant factor, which has perhaps been overlooked, is the prosecution's opportunity to present its case first. While this arrangement is a wholly justified consequence of the prosecution's burden of going forward (which is due to the interrelated principles of the presumption of innocence and the right of silence), its psychological impact on the trier of fact may be decisive in a case where there is strong but conflicting evidence on both sides.

[37] *State* v. *Johnson*, 28 N.J. 133, 145 A. 2d 313; *State* v. *Moffa*, 36 N.J. 219, 176 A. 2d 1.

APPENDIX A

Opinion and Judgment of the District Court of Appeal

Filed Apr. 26, 1965

IN THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT.
STATE OF CALIFORNIA

4 Crim. No. 2089

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

SAMUEL R. FRAZIER, *Defendant and Appellant*

APPEAL from an order of the Superior Court of Orange County. Howard C. Cameron, Judge. Affirmed.

Lippold, McCartin & Hall for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Gilbert F. Nelson, Deputy Attorney General, for Plaintiff and Respondent.

This appeal is from an order granting probation. Appellant, a medical doctor, was indicted by the Grand Jury of Orange County on 18 counts: 4 counts of abortion, 9 counts of rape and 5 counts of oral copulation. The jury found him guilty of three counts of abortion and one count of rape. A new trial was granted as to the count of rape, but all charges except the three counts of abortion on which appellant was convicted were dismissed on motion of the district attorney.

The evidence as to those three counts of abortion, viewed in the light most favorable to the prosecution, may be summarized as follows:

The three women, Watson, Lingenfelter and Tendler, each of whom respectively was named in one of the first three counts of the indictment, all dealt initially with ap-

pellant in substantially the same manner. Each suspected that she was pregnant and was from three and one-half weeks to two months overdue in her menstrual period; each was examined by appellant who confirmed to each the fact of her pregnancy; each told appellant of her desire to obtain an abortion. Appellant said to each of the women that he had a method of destroying the fetus in the womb by giving a series of four or more injections combined with manipulation of the uterus; that the price of the first four shots and treatments, which must be on consecutive days, would be $12 each; that if additional injections and treatments were necessary, they would be two or three in number and at weekly intervals, for which the price would be $13 each (there was a variance as to the number and spacing of the follow-up treatments in the testimony of one witness); that payment must be in cash; that she should come for the treatments at night or after hours on Saturday, and unaccompanied; that if she started receiving the treatments she must continue the course because a child which might be born after the treatments commenced would be either dead or deformed. Each of the women visited appellant's office in the manner outlined, and each received at least four injections and treatments in which appellant manipulated the uterus with one hand internally through the vagina, while exerting pressure upon the abdomen with the other hand; that during the treatment the patient was under the influence of Trilene, an analgesic or anesthetic gas capable of inducing unconsciousness; that each treatment lasted from one-half to three-quarters of an hour; that after four or more of the treatments each of the women miscarried; that each of the women was in good health at the time she sought the services of the appellant.

There is evidence from medical experts that it is possible to cause a miscarriage by the exercise of undue force exerted manually upon the pregnant uterus by the two hands. This evidence, it is argued, was sufficient to support findings that the appellant believed in each case that

the woman was pregnant, that he used a means with intent to procure the miscarriage of the woman, and that the same was not necessary to preserve her life.

There are, of course, conflicts in the evidence. Appellant testified that he told each of the women that he would use means to produce a miscarriage; but that he did so only to obtain time to determine whether the women were pregnant and in order that the women might not procure abortions elsewhere, so that by the time the treatments had been completed the pregnancies would be so far advanced that abortion would be out of the question; that the treatments in fact were only ordinary pelvic examinations; that the injections were of Prostigmin, which is used as a test for pregnancy and is not an abortifacient; that the Trilene gas was ordinarily used by him for pelvic examinations; that the treatments and the injections were only used to assist in determining the question of pregnancy; that the treatments were not intended, and would not be effective to induce a miscarriage.

Expert witnesses called by appellant testified that they had never known of an abortion produced by manipulation of the uterus and were of the opinion that it was not possible, although one of them said it was possible in theory.

A main contention made by appellant is that the trial court was without jurisdiction, based upon the claim that the evidence presented to the grand jury was insufficient in each count to support the indictment.

Appellant's motion to set aside the indictment in the trial court under Penal Code, Section 995, was denied. Although he did not seek prohibition under section 995a of the Penal Code, he may obtain on appeal a review of the sufficiency of the evidence to support the indictment (*People* v. *Elliott*, 54 Cal. 2d 498; *People* v. *Minkowski*, 204 Cal. App. 2d 832; *People* v. *Rosborough*, 178 Cal. App. 2d 156), since the sufficiency of that evidence is the basis of the court's jurisdiction to try the defendant (*Greenberg*

v. *Superior Court*, 19 Cal. 2d 319). The claimed insufficiency of the evidence is the failure to show, other than by testimony of appellant's own statements, that he believed a particular one of the three women was pregnant, or that he intended to cause any of the women to miscarry. Here, appellant's theory is that the corpus delicti must be established before his statements may be considered; and that without his statements made to each of the women as to her pregnancy and his intention to terminate it, there is a complete lack of evidence of two essential elements of the crime.

We think appellant confuses statements made by a defendant to connect him with a crime of which the corpus delicti must be proved by independent evidence and evidence of the statements of a defendant which are themselves a part of the res of the crime and are provable as such, as in *Perry* v. *Superior Court*, 57 Cal. 2d 276, where the oral statements of the defendant by way of false representations were essential to establishment of the offense charged.

Appellant further contends that the evidence before the grand jury was fatally deficient for lack of any evidence that the means he used were capable of producing an abortion.

In general, the testimony of the three women before the grand jury as to their visits to and dealings with the appellant, and as to what he said and did to them, is substantially the same as their testimony at the trial, as summarized hereinbefore.

The production of expert testimony before the grand jury that the means used by appellant were capable of causing a miscarriage was not essential to support the indictment. Thus in *People* v. *Ames*, 151 Cal. App. 2d 714, the abortees had been unconscious and none was able to testify as to the means used, nor was there any testimony on that score; in *People* v. *Wilkes*, 177 Cal. App. 2d 691, convictions of three different counts were sustained on evi-

dence of three different insertions of a pack of an unidentified substance in the vagina of the same woman during the same pregnancy; there, the defendant particularly argued that " 'there is no evidence in the record as to what substance was used, or that the substance used did or could procure the miscarriage . . .' " [page 699]; in *People* v. *Von Mullendorf,* 110 Cal. App. 2d 286, convictions were affirmed on two counts of abortion arising out of two transactions on a Saturday and the following Monday involving the same woman, where at least as to the first transaction there was no identification of the means used; in *People* v. *Wilson,* 54 Cal. App. 2d 434, three doctors testified that a woman died by reason of an incomplete abortion, though none of them made the direct statement that some drug or instrument had been used.

It seems, therefore, that whether the means used by the appellant here were capable of causing a miscarriage bears upon the question of the appellant's intent rather than upon the gist of the crime. Certainly if the appellant knew or believed that the means used were wholly incapable of producing the result, the necessary intent would have been lacking. However, the evidence that the appellant claimed that the means he proposed would produce a miscarriage and that he did use those means shows *prima facie* the necessary intent.

The trial court properly denied the motion made under section 995 of the Penal Code.

INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE VERDICT

A large part of appellant's attack upon the sufficiency of the evidence is directed to the point that the medical experts for the prosecution who testified that a miscarriage could be induced by manipulation of the uterus did not specify the degree of pressure required; that one of them, Dr. Murrieta, spoke of "undue force" as being "tremendous pressure"; and that there was no evidence that appellant exerted "tremendous pressure."

The witness was speaking of bimanual manipulation; and of "tremendous pressure being exerted between the two hands of the examiner with the uterus in between." By definition, the pressure required would be such as could be exerted by the hands. Appellant did exert pressure manually. The question as to the sufficiency of the pressure was for the determination of the triers of fact who had the opportunity to observe appellant's apparent physical condition.

In *People* v. *Richardson,* 161 Cal. 552, the reported decision mentions evidence of experts that pills furnished by defendant "if taken in sufficient quantity" were capable of producing an abortion in 75 or 80 per cent of the cases; in the specific case they did not do so, and the woman bore a full-term child some seven months later.

Moreover, we think the question again is one of the appellant's belief in the sufficiency of the means and of his intent in employing them.

In dealing with the sufficiency of the evidence to support the indictment, we have disposed of some of the problems as to the sufficiency of the evidence to support the verdict. This is not to say that the evidence presented to the grand jury would have been sufficient alone to support the verdict.

There is additionally the question of the necessary corroboration of each of the three women on the count in which she is named.

As outlined above, the appellant testified that each of the three women sought an abortion; that he told each that he would help her to that end and that he outlined the means by which he would do it; and that he simulated the carrying out of his promise, although intending not to produce a miscarriage and using procedures which would not have that effect. Thus his testimony furnishes corroboration. (*People* v. *Davis,* 43 Cal. 2d 661, 675.)

Further, the testimony of any one of the three women could corroborate that of either or both of the two others as to the *modus operandi* employed by appellant. (*People* v. *Gallardo,* 41 Cal. 2d 57, 64; *People* v. *Ames, supra,* 151 Cal. App. 2d 714, 720.)

The testimony of the woman named in the fourth count of the indictment on which appellant was not convicted could not supply corroboration. (*People* v. *Tatge,* 219 Cal. App. 2d 430, 433.)

Appellant cites *People* v. *Tatge, supra,* to support his claim of the insufficiency of the evidence. The following quotation from that case should point out the striking differences between the state of the evidence in *Tatge* and in the case at bench.

> "She told defendant on that visit that she thought she was pregnant and asked him to see if she was. There was no further conversation about pregnancy. He made a pelvic examination of her and told her to come back the next day. The doctor was not asked his diagnosis and did not advise Mrs. Wilber of it, told her nothing except to return on the next day.
>
> "...
>
> "... Mrs. Wilbur further said that when she went to defendant she had not missed a menstrual period and was not late; had had two previous periods that were not exactly normal but had not missed a period. Defendant never said what he was going to do and she did not ask him. When she first saw him she told him she wanted to see what was wrong with her; that she thought she was pregnant. At no time was there any conversation with defendant about terminatting pregnancy ..." [pp. 434-435]

Appellant next argues particularly that there is not even any substantial evidence that he believed Lingenfelter to

be pregnant. She had missed a menstrual period and was experiencing nausea. Appellant gave her a pelvic examination. Thereafter there were various conversations between appellant and Lingenfelter, as testified to by her:

"A. I had asked him if there was any way that I could lose the baby.

"Q. And what did he say at that time?

"A. And he asked if I had been told about the shots that he gave; and I told him yes.

". . .

"A. He said that along with the shots that he would manipulate the womb, that this would cause the womb to contract. This contraction of the womb would cause the fetus to dispel itself.

". . .

"A. . . . before he gave me the shot he told me that once I started the shots I must not stop. They must be continued, as it could be harmful to myself and to the baby . . .

". . .

"Q. I see. In other words, he didn't give you any idea how many shots would be necessary?

"A. He said seven shots, and that it might not take all seven to cause the miscarriage."

Subsequently, Lingenfelter miscarried.

From all of this, the jury might well have found that appellant believed the woman to be pregnant.

Except for the possibility that evidence received on the first count involving Patricia Ann Watson, as hereinafter mentioned, may have been improperly admitted, the evidence was sufficient to support findings that appellant on

each of the first three counts of the indictment did the prohibited acts.

Claimed Errors in Law

1. After appellant had secured the names of prosecution witnesses in pre-trial discovery, he obtained ex parte an order that he might take statements from the prosecution witnesses, and on January 8, 1964, did obtain statements, reported and written up by a shorthand reporter, from Barbara Tendler named in count three of the indictment, from Maurine O'Connell named in count four and of Carol Sims, a corroborating witness as to count four.

On January 31, 1964, the district attorney, on motion, obtained an order that appellant furnish the district attorney with copies of the transcripts of the statements made by the three women to appellant's counsel; and on February 17, 1964, obtained an order for production of the names of witnesses as to appellant's character, as to the general reputation of the women named in the counts charging rape, and expert medical witnesses, to be called by appellant.

Appellant urges that the order pursuant to which the district attorney was furnished with copies of the transcripts of statements obtained by appellant from the three prosecution witnesses violated his rights under the Fifth Amendment to the United States Constitution and article 1, section 13 of the California Constitution. He claims that the copies of the transcripts were "private documents" and their production constituted self-incrimination. He makes the same contention concerning the disclosure of the names of witnesses he intended to call in the three categories mentioned. He argues additionally that the effect of the orders for production and discovery obtained by the district attorney was to deprive appellant's counsel of the protection of his work product in violation of the policy declared by section 2016(g) of the Code of Civil Procedure.

The district attorney was denied access to any statements that had been obtained by appellant from the anticipated defense witnesses.

The prejudice is asserted by appellant to consist in this:

It was claimed that each of the four women whom he was charged with aborting had been raped by him while she was under the influence of Trilene gas; and also that he had at the same time done acts in violation of section 288a of the Penal Code upon the bodies of Watson, Tendler and Lingenfelter. Defendant denied all of those acts; he admitted having had sexual intercourse with Tendler and Lingenfelter while they were at his office for the treatments but only as the result of advances made by the women. Since appellant denied also having had any intent to induce a miscarriage as to any of the women, his credibility on that last matter was of paramount importance; challenging his credibility was the testimony of each of the four women, which tended to conflict with appellant's testimony on the issue of his intent; any evidence which might tend to impeach the credibility of those four prosecution witnesses was critical; the statements which appellant obtained from Tendler, O'Connell and Sims might possibly have been used for such impeachment if those witnesses had not had, through the district attorney, the opportunity of reviewing the statements they had given to appellant; that his right of cross-examination was a valuable defense weapon; that in attacking, on cross examination, the credibility of a witness, the surprise of producing impeaching material is an important element; that appellant was deprived of the benefit of such impeachment and surprise in cross-examination; that the disclosure of the names of defense witnesses was prejudicial; and that together the effect of the discovery orders was a denial of due process.

Concerning all of those contentions, these observations may be made:

The statement given to appellant by Tendler was made in the presence of her husband.

The statement of O'Connell was made in the presence of Sims. Defendant was not convicted of any charge as to which O'Connell or Sims testified.

There was nothing confidential in the manner of giving any of the three statements; any of the witnesses might have required the presence of a reporter for her benefit.

The statements could not have been used in evidence by the prosecution, unless to meet a claim of recent fabrication, although the statements were given not more than six weeks before the trial commenced.

None of the statements was used for impeachment by defense counsel, and it might seem that had there been any substantial variance from the statements it would have been beneficial to appellant; the effect of the witnesses' having seen the statements would have been to caution them against testimony more unfavorable to appellant than that contained in the statements.

While appellant's argument presupposes that one or more of the witnesses would have departed substantially from the content of the statements, he does not point up any discrepancy between the statements obtained by him and earlier statements made by the same witnesses with copies of which he had been furnished by the district attorney.

The copies of the transcripts were not private papers of the appellant. They were not the results of confidential study and investigation such as to bring them within the protection of the "work product" rule.

Concerning the disclosure of the names of defense witnesses in the three categories mentioned, appellant mentions that no witnesses as to appellant's character were called. In the other two categories there were no witnesses who would or did testify about any fact concerning the

appellant, his conduct, or his previous history. It cannot, therefore, be said that the appellant was compelled to furnish information to be used against himself. (*Jones* v. *Superior Court*, 58 Cal. 2d 56; *People* v. *Lopez*, 60 Cal. 2d 223.)

2. It is next contended that the receipt into evidence of an appointment book (People's Exhibit No. 3) and of an oral statement, both obtained from appellant by Robert Zielinski, an investigator for the state on the occasion of appellant's arrest by the Costa Mesa police, violated the appellant's right to have counsel and to be advised of his right to counsel and against self-incrimination. The statement, as testified to by Zielinski, was that appellant said he knew the officers were coming, and also that, in substance, the following was said:

> Zielinski: Did you give Miss Watson a series of Prostigmin shots?
>
> Frazier: Yes.
>
> Zielinski: Why aren't they entered on her chart?
>
> Frazier: Because she's a very good friend of mine.
>
> Zielinski: If she's such a good friend of yours why did you charge her $15 per shot?
>
> Fraizier: Well, I don't want to answer any more questions.

Concerning this evidence, appellant stated, at page 100 of his opening brief:

> "We do not claim that the evidence thus extracted was so damaging that its absence would have resulted in the jury returning a different verdict. Had we even regarded the evidence as slightly important we would have included it in our Statement of the Case."

He then argues that the conversation testified to may have had some effect in the jury's mind as to appellant's credibility.

Since there was independent evidence as to the charges made for the treatments, and that no record was made of them, we do not see that the admission into evidence of the statements was prejudicial.

The rule of *People* v. *Dorado,* 62 A.C. 350, would apply to an admission, short of a confession, which might tend to incriminate, although the receipt into evidence of an admission alone need not require automatic reversal. However, appellant's statement that he had given Prostigmin shots to Miss Watson was not an incriminating admission.

By August 16, 1963, appellant's attorney was active on his behalf; so that on August 26 when he was arrested he was aware of his right to counsel, and in fact did refuse to answer any more questions when asked why he charged Watson $15 a shot.

The appointment book was voluntarily given to Zielinski; and at the same time the officers picked up the records concerning Watson and other prosecution witnesses found in the doctor's office. These matters were not objected to; and it may be presumed that they were seized or subject to seizure under a search warrant.

There was no error in the admission of the evidence.

3. Appellant offered in evidence his 1962 federal income tax return for the purpose of showing lack of financial motive. Objection to the offer was sustained by the trial court. This is assigned as error.

Appellant argues that evidence of the charges made for the treatments was offered by the prosecution to establish a motive. That is pure speculation. The district attorney did not suggest pecuniary gain as the motive. The

evidence as to the charges for the treatments more probably showed a uniform pattern of conduct.

There was no conflict as to the amounts charged by appellant regardless of what his intentions may have been, and regardless of his other sources of income. The amounts charged were considered sufficient for treatments represented as being given to produce an abortion. Whether the amounts charged furnished a sufficient motive for a violation of section 274 of the Penal Code would be a matter of argument; and it was argued by appellant's counsel. (Reporter's transcript, page 1556, lines 8 to 22.)

People v. *Weatherford,* 27 Cal. 2d 401, does hold unequivocally that it is reversible error to exclude evidence which tends to rebut the existence of a motive for crime suggested by the prosecution. Such is not the situation here. There was no error in excluding the income tax return.

4. It was not error to receive evidence of the actual miscarriages of Tendler and Lingenfelter. The court gave an instruction restricting the effect of such evidence to possible proof of pregnancy. (Clerk's transcript, page 281.) Proof of pregnancy may be received. (*People* v. *Kutz,* 187 Cal. App. 2d 431; *People* v. *Ames, supra,* 151 Cal. App. 2d 714; *People* v. *Califro,* 120 Cal. App. 2d 504.) In *People* v. *Ames, supra,* the resumption of an interrupted menstrual flow was one of the evidentiary matters considered as proving the corpus delicti. Appellant himself testified that Tendler had miscarried.

5. There was no error in excluding evidence of the opinion of a technician who gave appellant a polygraph examination. Appellant claims that the questions put to appellant in the examination and appellant's answers thereto were part of the examination of appellant by Edward B. Banks, who was not the polygraph technician and who testified to his conversations with appellant. Appellant contends that since part of the conversation went into evidence, all should be admitted.

There are two points to observe. The questions and the answers would not include the technician's opinion as to the results; it was that opinion that appellant sought to bring before the jury. Such opinion was inadmissible. (*People* v. *Carter*, 48 Cal. 2d 737; *People* v. *Porter*, 99 Cal. App. 2d 506.)

Secondly, the questions and answers with two exceptions had to do with the counts of rape and sex perversion as to none of which appellant stands convicted. The two exceptions were questions as to whether appellant had introduced any instrument or catheter into the uterus of Tendler or Lingenfelter, to which his answers were "No." There seems to be no testimony by either of those women that the appellant introduced any instrument into the uterus. It is true that after Tendler aborted both she and appellant testified that tissue was removed from the uterus, but by what means was not stated.

6. It was not error to permit the prosecution's medical experts to testify generally that a miscarriage could be induced by manual pressure exerted upon the uterus. In *People* v. *Valliere*, 123 Cal. 576, 578, the question was: "Could a man be killed with that weapon?" The court said, at page 579:

> "The testimony of Doctor Gates would seem to show that whether the instrument used was such as would likely produce death depends upon the manner of its use and the portion of the body upon which it was used, and therefore it becomes a mixed question of law and fact which the jury must determine under proper instructions."

(See also *People* v. *Sampo*, 17 Cal. App. 135, 149.) In *Ward* v. *Read*, 219 Cal. 65, 71, the court said:

> "Complaint is made of the introduction of expert testimony concerning the possibility of tuberculosis resulting from a severe blow just below the left chest

followed by a bruised spot, and a condition of pleurisy, where the evidence disclosed the blow and a subsequent case of tuberculosis developing in both lungs. Outside of the weakness inherent in the testimony, because it was confined to a possibility instead of a probability, we see nothing of which appellant may justly complain."

In *Khan* v. *Southern Pacific Co.*, 132 Cal. App. 2d 410, 415, the court mentioned as evidence which supported the verdict that:

"There was other expert testimony that retinal detachment is often caused by trauma."

In *Agnew* v. *City of Los Angeles*, 97 Cal. App. 2d 557, 566, the court said:

". . . he was fully competent to give the jury his opinion as to the cause of aseptic necrosis generally and as to the cause in the present case."

In *Fireman's Fund etc. Co.* v. *Ind. Acc. Com.*, 93 Cal. App. 2d 244, one of the medical experts reported at page 245:

" 'If it is possible, it would be advisable to obtain an expert opinion on the types of dust that this man was exposed to and the possible concentrations. If these concentrations were marked and his patient had adequate exposure to siliocosis-producing irritants, then it is reasonable to consider that this patient's lungs received additional trauma during his work between 1942 and 1945.' "

The court noted at page 246:

"It was not possible to get expert opinion as to the types and concentrations of dust to which Whitaker was exposed . . .

> "Another medical witness, Dr. Wiper, reported: '. . . Aggravation of this silicotic process could have been accomplished . . . only if the dust concentration in this employment had reached pathological levels.' "

Concerning the effect of the evidence, the court said, at page 247:

> "We cannot say that the evidence of the amount of dust breathed in by Whitaker and the history of his increasing lassitude and shortness of breath as he continued to work as a grinder, coupled with the medical testimony above quoted of the possibility of aggravation of his pneumoconiosis by breathing dust in undue quantities, do not reasonably support the finding of the commission."

In *Shaw* v. *Owl Drug Co.*, 4 Cal. App. 2d 191, 195, the court said:

> "Dr. Parsons stated that metastatic carcinoma—that is, the traveling of malignancy from one part of the body to another—may occur where primarily there is a cancer of an organ such as the breast, but that if it does, it develops usually where there has been trauma; that it takes its seat in some part of the body that has been injured or devitalized. . . . While he gave no definite, absolute opinion that the diseased condition of the femur at the point of fracture was precipitated by the injuries plaintiff received to the leg in the sidewalk accident, his entire testimony was such as to warrant such conclusion."

The testimony given in the case of *Schuh* v. *Oil Well Supply Co.*, 50 Cal. App. 588, (and found sufficient, also was of a general character as appears from the following quotation found at page 591:

> "It is true that the pus condition might be the result of improper care or carelessness; but, on the other

hand, the witness said that such condition might result when the treatment was skillful and proper. The evidence was competent. Whether or not this condition was one of the natural consequences of the accident was, we think, a question for the jury."

To the same effect is *Dow* v. *City of Oroville,* 22 Cal. App. 215, 226. See also authorities collected in 7 Wigmore on Evidence, 3rd Ed., section 1976.

Authorities cited by appellant deal mainly with situations in which an expert opinion was sought as to whether the specific physical condition found to exist was the effect of a given cause.

Thus in *People* v. *McCaughan,* 49 Cal. 2d 409, cited by appellant, the opinion sought to be elicited was the cause of death under specific circumstances based upon a hypothetical question which omitted one uncontroverted material fact.

In *People* v. *Le Doux,* 155 Cal. 535, cited by appellant, the witnesses were asked to assume that "each and all of the facts and circumstances testified to by these gentlemen I have named are true" and upon such assumption to give an opinion as to the cause of death.

Here appellant has strenuously contended that the specific physical condition of each of the three women, to wit, the suffering of a miscarriage, was not evidence properly before the court; no doubt he would contend that the admission of opinion evidence to show that the miscarriage in any one of the three instances was caused by the acts of the appellant would have been prejudicial error of the most serious nature.

7. The appellant discusses, but does not emphasize, that prejudice might have resulted from the joinder of the counts charging rape and sex perversion with those charging abortion. The jury found appellant guilty of three

of the four counts of abortion, and one count of rape. After the granting of a new trial on the rape count, it was dismissed. Seemingly, the jury was able to distinguish between and weigh the evidence bearing upon the various charges. There was no error in denying the motion for severance.

Claimed Prejudicial Misconduct of the District Attorney

1. (a) The most serious charge of misconduct is that the district attorney held out to the jury an inducement to find appellant guilty upon the suggestion that he would suffer no penalty more severe than probation or a fine.

We agree that it would be prejudicial error for a prosecutor to offer to a jury a sugar-coated alternative to their hard duty of finding upon the facts. Let us consider if the district attorney has done this—whether the language in context is actually intended to or has the effect of suggesting that at worst the defendant would receive probation or suffer a fine.

The language complained of is found on page 1445 of the transcript in the People's opening argument, which had started at 11:00 a.m., on page 1440, and which was interrupted at 12:00 noon, on page 1459. It was, therefore, in the introductory stage of the argument. The full context was as follows:

> "And, likewise, in conclusion, you as a jury have the duty of deciding the defendant's innocence or his guilt, but the Court will instruct you that in your deliberations you are not to consider any matter of penalty, whether or not the defendant is given probation or he has to pay a fine is not for you to consider. You only consider his guilt or his innocence."

Notwithstanding what appellant now claims to have been a telling and unfair insinuation, at the start of the after-

noon session of the same day he agreed with the district attorney that the opening argument need not be reported further unless some specific portion was desired to be made a part of the record. During the remainder of the opening argument, only two matters were made a part of the record.

As mentioned by appellant in his brief, his counsel in argument to the jury discussed the possible consequence of conviction, stating at page 1466:

> "One or two things preliminarily: You are not to consider any punishment that the doctor may receive. That is not before you, and you will be so instructed. However, I do say this: Mr. Jeffries, in his opening argument, intimated that you are not to be concerned with punishment, and so forth. The doctor may receive a fine, or he may be on probation, and so forth; but I would like to state that also the doctor, if he is convicted of these particular crimes, can receive 107 years in the State Prison. In addition, he will never practice medicine again."

Appellant took no exception to the remarks of the district attorney at the time they were made, asked for no admonition from the court, and presented the other possible consequences in a matter-of-fact manner. There was no prejudicial misconduct in the district attorney's remarks; and they can have had no such prejudicial effect at the time they were made.

1. (b) Appellant claims that two questions put to him on cross-examination by the district attorney constitute prejudicial misconduct; Appellant was asked if he were leaving for Oregon to take the medical board examination; and draws some unnecessary inferences from the question. A doctor might have several possible reasons for becoming qualified to practice in another state. It was appellant's own counsel who told the jury, "He probably

has lost his practice completely with the publicity he has gotten, and he probably deserves it . . ." (Reporter's transcript, page 1560, lines 5 to 7.) However, it is unlikely that a physician whose license to practice has been revoked for abortion and raping his patients would qualify in another state.

The district attorney asked appellant concerning his membership in the Orange County Medical Association. These questions which with their answers were not the subject of objection or motion to strike are as follows:

"Q. You are not a member of it this year, however. Is that correct?

"A. I paid my dues the first of the year.

"Q. You did pay your dues at the first of the year?

"A. Yes, sir."

So far, therefore, as the record shows, appellant continued to be a member of the association.

No prejudicial error was committed in the two sets of questions.

1. (c) The claim is not sustained that the district attorney in his closing argument asserted a lack of good faith on the part of appellant's counsel based upon the latter's argument to the jury. The district attorney was entitled to point out differences of opinion as to what facts had or had not been proved; and to criticize the arrangement and order of presentation of his opponent's arguments.

2. (a) The questions put to Dr. Murrieta and Dr. McDermott did not assume the existence of a fact not proved, which if true would have been damaging to the appellant, as was the case in *People* v. *Teixeira,* 136 Cal. App. 2d 136; nor did the questions suggest what the questioner believed the answers would be.

The court instructed the jury in part as follows:

> "... if any counsel intimated by any of his questions that certain hinted facts were or were not true, you must disregard any such intimation, and must not draw any inference from it."

The repetition in varying forms of a question to which objection has been sustained must be condemned, and the district attorney was subject to severe censure by the trial court. The offense, however, was against the court rather than the appellant.

2. (b) Concerning another question put to Dr. Murrieta, whether an act of sexual intercourse could under certain conditions produce an abortion, to which an objection was sustained upon the ground that it was not proper redirect examination, appellant now claims misconduct, but writes: "The conduct was probably more disgusting than harmful."

2. (c) Coupled with the foregoing claimed misconduct is the language of the district attorney in argument to the jury at page 1453 of the reporter's transcript in which he queries: "Do we know whether or not he inserted an instrument in her to break the water bag?" and added "We don't know. She was unconscious at the time." Objection was made at the time and the jury was admonished by the trial court with the observation that there was no evidence "that any instruments were used at the time that counsel refers to."

Oddly enough, however, appellant had himself produced the following hearsay testimony from Robert Zielinski when he testified as appellant's own witness:

> "... on the 6th of June, Dr. Frazier entered the subject's uterus with forceps and broke the water bag."

2. (d) Appellant finds serious fault because the district attorney in closing argument said:

> "I'm not for one moment conceding that the doctor was injecting Prostigmin into any single one of these women. He was injecting another substance. He was injecting a different—"

and further that the district attorney asked questions of Dr. Murrieta and of Dr. McDermott as to the effect of oxytocic drugs.

It was clear from the evidence that Prostigmin does not have the effect of contracting the uterus; that oxytocic drugs can have such effect. Appellant testified that the injections given to the three women were nothing other than Prostigmin. No other witness identified the substance injected as being other than Prostigmin.

It is sufficiently clear from the testimony of the three women, and of appellant, that he intended them to believe, and that they did believe, that he would and did give them shots that would contribute to a miscarriage. Prostigmin would not have that effect. It would not be unreasonable, and would not be prejudicial misconduct, for the district attorney to suggest that what the appellant told his patients was true rather than what he told the jury as to the nature of the injections. Just as in *People* v. *Wilkes, supra,* 177 Cal. App. 2d 691, the testimony of the defendant as the harmless nature of the means he used is not conclusive upon the jury; and in doubt concerning its veracity accordingly may be argued.

Prejudicial misconduct on the part of the district attorney should be determined from the whole record, in the absence of flagrant instances, which we do not find. Considering the length of the record, it may be said that it is not burdened with instances of misconduct and is free of prejudicial misconduct.

Since the trial judge did not pronounce judgment separately as to the three counts, it results that appellant was given a concurrent sentence for the term prescribed by law.

The order granting probation is affirmed.

Whelan, *J.*

We Concur:

Brown, *P. J.*
Coughlin, *J.*

Certified for non-publication, Rule 976.

Brown, *P. J.*
Coughlin, *J.*
Whelan, *J.*

APPENDIX B

Order of Supreme Court of California

Order Denying Hearing
After Judgment by District Court of Appeal
Fourth District, Division —, Crim. No. 2089

In the Supreme Court of the State of California
In Bank

PEOPLE

v.

FRAZIER

Appellant's petition
for hearing DENIED

Peters, J. and Peek, J.
are of the opinion that the
petition should be granted.

TOBRINER,
Acting Chief Justice

APPENDIX C

Constitutional Provisions Involved

United States Constitution:

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section 1:

> **All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

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No. 755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

SAMUEL R. FRAZIER, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

On Petition for a Writ of Certiorari to the District Court of Appeal, Fourth Appellate District of California

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PETITION FOR REHEARING

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PETITION FOR REHEARING

I.

On January 17, 1966, this Court denied the Petition for Certiorari in this case, Mr. Justice Black noting his opinion that certiorari should be granted. Two days later this Court decided *Tehan* v. *United States ex rel. Shott,* 34 LW 4095, holding that the doctrine of *Griffin* v. *California,* 380 U.S. 609, will not be applied to convictions which became final before it was announced. This result was predicated on the purpose of the privilege against self-incrimination, which the Court's opinion in *Tehan* explicated in terms of most immediate relevance to this case:

> "First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted *unless the prosecution 'shoulder the entire load'* " (34 LW at 4098).

The California courts did not require the prosecution to "shoulder the entire load" in convicting petitioner. On the contrary, they compelled him to contribute to his own conviction by revealing substantial elements of his case in advance of trial and by turning over to the prosecution not only the names of witnesses whom he would call, but statements obtained by his counsel from prosecution witnesses, substantially inhibiting his opportunity to impeach those witnesses on cross-examination. They based these discovery orders on *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879. Yet even assuming the validity of the premise of the *Jones* decision, that discovery invariably promotes truth,[1] California's subordination of the privilege against self-incrimination to that objective cannot be squared with the proposition that "the Fifth Amendment privilege against self-incrimination is not an adjunct to the ascertainment of truth". *Tehan, supra,* 34 LW at 4098. See also Pet. pp. 19-20. In short, the Supreme Court of California in *Jones* (which was decided before *Malloy* v. *Hogan,* 378 U.S. 1) and the courts below in this case (where petitioner relied on *Malloy*) have failed to effectuate the distinction between an accusatorial and an inquisitorial sys-

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[1] As demonstrated in our Petition (pp. 19 and 21-23) and herein (p. 4 *infra*), the record in this case discredits that premise. As Judge Aldrich has said:

> "If every witness consistently told the truth, and none cut his cloth to the wind, little possible harm and much good might come from maximum pretrial disclosure. Experience indicates, however, that there are facile witnesses whose interest in 'knowing the truth before trial' is prompted primarily by a desire to find the most plausible way to defeat the truth." *Margeson* v. *Boston and Maine Railroad,* 16 F.R.D. 200, 201 (D. Mass.).

See also *Fidelis Fisheries* v. *Thorden,* 12 F.R.D. 179, 180 (S.D.N.Y., Weinfeld, J.).

tem of prosecution, which the Fifth Amendment is designed to secure, as *Malloy* held and as *Tehan* has now reiterated. (Indeed, the opinion in *Tehan* quotes the precise language from *Malloy* on which our petition for certiorari explicitly relied. Compare 34 LW at 4091 with Pet. p. 10.) Thus, *Tehan* reinforces our contention that Petitioner has been deprived of his liberty by procedures "probably not in accord with the applicable decisions of this court". Rule 19 1(a).

It is plain that the Supreme Court of California takes a far more restrictive view of the privilege against self-incrimination than does this Court. In *People* v. *Modesto,* 62 Cal. 2d 436, Mr. Justice Traynor declared that a prosecutor's comment on a defendant's failure to testify is not so direct a penalty for exercising the right of silence that it violates the Fifth Amendment. It is understandable, therefore, that the same court would consider a requirement that the defendant submit information to the prosecution in advance of trial to be a permissible limitation on his right to silence; and that indeed was its reasoning in *Jones* v. *Superior Court, supra.* But this Court in *Griffin* v. *California, supra,* expressly disapproved *Modesto,* see 380 U.S. at 614.[2] The holding in *Griffin* that the California comment rule cannot survive *Malloy* was predi-

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[2] A further indication of this conflict in constitutional philosophies is the California Supreme Court's recent decision in *People* v. *Thayer,* 63 A.C. 664. There the court declined to follow *Gouled* v. *United States,* 255 U.S. 298 which holds that evidentiary searches are forbidden by the Fourth and Fifth Amendments. It would appear that it is precisely with respect to evidentiary searches that the proposition that these Amendments run "almost into each other" is most apposite. See *Boyd* v. *United States,* 116 U.S. 616, 630; *Gouled* v. *United States,* 255 U.S. 298, 306; *United States* v. *Lefkowitz,* 285 U.S. 452, 466-467; *Malloy* v. *Hogan,* 378 U.S. 1, 8. The *Gouled* principle is, of course, an additional basis for reversal here since the orders to produce encompassed tangible property, see Pet. pp. 7-8, and p. 11, n. 6.

cated in part on the view that the Constitution forbids even the slightest penalty for exercising the constitutional privilege. Perhaps even more importantly, this Court recognized that the constitutional right of silence is an adjunct of the presumption of innocence which adheres to every defendant. But that presumption is denied effect where, as here, a defendant is required to give information to the prosecution tending to support his innocence before the prosecution has put on any evidence, let alone made out a *prima facie* case that he is guilty.

In emphasizing that the privilege against self-incrimination has purposes other than the ascertainment of truth we do not intend to minimize the substantial interference which disclosure in this case did have with the truth-seeking process. The court below reasoned that the order to produce the statements which counsel had obtained from the prosecution witnesses *aided* the defendant because "the effect of the witnesses' having seen the statements would have been to caution them against testimony more unfavorable to appellant than that contained in the statements". Pet. P. 11a. We submit that this reasoning is tantamount to a concession that petitioner was denied due process of law. For a defendant is, of course, entitled to a trial based on the true recollection of the prosecuting witnesses rather than on the testimony which they believe is least likely to subject them to successful impeachment by cross-examination. The constitutional right of confrontation and cross-examination, made applicable to the states in *Pointer* v. *Texas,* 380 U.S. 400, as well as the most elemental notions of due process require no less.

The order to produce the statements of the prosecution witnesses interfered likewise with the petitioner's constitutional right to counsel. Our petition for certi-

orari pointed out that the compulsory disclosure of counsel's work product inevitably inhibits counsel's preparation for trial, See *Hickman* v. *Taylor,* 329 U.S. 495, 511, for which the Constitution guarantees criminal defendants the effective assistance of counsel. See the cases cited in Pet. p. 21 and *Townsend* v. *Bomar,* 351 F. 2d 499 (CA 6). The conclusion that petitioner was deprived of his constitutional right to counsel follows also from the principle that under our "adversary system of criminal justice" *Gideon* v. *Wainwright,* 372 U.S. 335, 344, a defendant is entitled to the undivided loyalty of his counsel, *Glasser* v. *United States,* 315 U.S. 60; *Tucker* v. *United States,* 235 F. 2d 238 (CA 9); *Case* v. *North Carolina,* 315 F. 2d 743 (CA 4). An order that counsel produce materials which he has obtained in defendant's behalf but whose use would also benefit the prosecution (which seeks to obtain such benefit by its discovery motion) compels him to choose between protecting the interests of his client, the defendant, and saving himself from the sanction of contempt. The conflicts which were found to vitiate the convictions in the cited cases seem insignificant by comparison. Cf. *Goodson* v. *Peyton,* 351 F. 2d 905, 909 (CA 4) disapproving the Virginia practice of appointing Commonwealth Attorneys from one county as defense counsel in other counties because it is "likely" to create conflicts of interest.

II.

The question presented by this case potentially affects all convictions in California where the prosecution has obtained compulsory discovery from the defendant, as well as those in fourteen other states where the defendant has been required pursuant to statute to give notice of an alibi defense before trial. Our original assertion that "the question is important to the administration of criminal justice" (Pet. p. 24), remains undenied.

If this Court nonetheless has doubts regarding the prevalence of this practice we urge that it call for a response from the Attorney-General of California who alone would know the extent of the state's utilization of the discovery procedures sanctioned by *Jones* v. *Superior Court, supra.*

Because of the nature of the accusation (which petitioner steadfastly denies) the record in this case is not attractive. But we submit that it comports with neither the efficient nor the equal administration of justice to allow petitioner's conviction to stand and to postpone decision of this question until it is raised again, perhaps in a capital case. The disadvantage of delay is underscored by the decision in *Tehan, supra,* which, though holding that *Griffin* v. *California* (and presumably *Malloy* v. *Hogan* also) will only operate prospectively, acknowledges that convictions which have become final since those decisions were rendered are subject to their rule. 34 LW at 4096, n. 3. See also *Banks* v. *California,* 34 LW 3256, No. 87 Misc., Oct. Term 1965. Thus, until the substantial constitutional question raised by this case is resolved, all convictions where the prosecution has obtained compulsory discovery since *Malloy* will be subject to attack both on direct appeal and in post-conviction proceedings in state and federal courts.

The question presented by this case is worthy of review also because of its potential impact on the proposed amendments to the Federal Rules of Criminal Procedure. The Advisory Committee proposed an amendment to rule 16(c) which would allow a trial court to condition discovery in favor of defendants on the granting of reciprocal disclosure by the defendant to the prosecution, 34 F.R.D. 411, 422, citing *Jones* v. *Superior Court, supra* in support of the constitutionality of this proposal. Id. at 423. In a committee note,

an alternative draft of rule 16(c) is set forth which would allow discovery by the Government of matter which the defendant intends to produce at the trial. Id. at 425. This proposal would in effect codify the rule of *Jones* v. *Superior Court* for federal cases. Indeed, its very phraseology—"the defendant intends to produce at the trial"—embraces the fallacy which underlies the *Jones* decision, that a defendant can be required to determine what evidence he will introduce before the prosecution has put on its case. See Pet. pp. 17-19. Thus, the same question which this case presents will necessarily be before this Court when, in the exercise of its rule-making authority, it passes on the proposed amendments to the rules. Surely it is preferable that consttitutional questions be decided in an adversary proceeding where the Court will have the benefit of the briefs and arguments of counsel. Indeed, it is particularly appropriate here where the constitutional question involves the interest of many states, whose law enforcement officials would not normally be expected to comment on proposed amendments to the Federal rules. Moreover, the Court's conclusions in a case are precedents which guide other courts while the reasons for the rejection of proposed rules remain unknown. In this connection it is useful to recall that when the Federal Rules of Criminal Procedure were originally adopted one of the proposals was that defendants be required to give notice of an alibi defense. This proposal was not adopted, but as the Court did not reveal whether its rejection was due to constitutional doubts, the proposal reappeared in the preliminary draft of proposed amendments, 31 F.R.D. 665, 675-676. It was later dropped, again without explanation. See Pet. p. 24, n. 33.

We recognize that petitions for rehearing of denials for certiorari are not favored, but they are not in-

evitably without merit. Though it may seem surprising in retrospect, now that *Hickman* v. *Taylor, supra* is recognized to to be a leading precedent on the scope of civil discovery, certiorari was originally denied in that case, 327 U.S. 808, and was granted only on rehearing, 328 U.S. 876. The significance of the present case for discovery in criminal cases (both in favor of and against the prosecution, see Pet. pp. 24-26) similarly counsels careful reconsideration of the original denial of certiorari herein.

CONCLUSION

For the reasons stated herein the order denying certiorari should be vacated and the Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

GEORGE KAUFMANN

February 11, 1966